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No. 01-1624

In the Supreme Court of the United States

CITY OF MIDDLETOWN, ET AL., PETITIONERS

v.

REGIONAL ECONOMIC COMMUNITY ACTION PROGRAM, INC., AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether alcoholics in the early stages of attempted recovery, who are unable to remain sober while living independently and taking care of their daily needs, are individuals with disabilities within the meaning of the Americans with Disabilities Act, the Rehabilitation Act, and the Fair Housing Act.

2. Whether the court of appeals erred in finding, based on the record in this case, that genuine issues of material fact preclude a grant of summary judgment on the question of whether the denial of a zoning permit was motivated by discrimination on the basis of disability.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22a-48a) was originally published at 281 F.3d 333. The opinion, as corrected by an errata sheet, will be published and is available at 2002 WL 449493. The ruling of the district court (Pet. App. 1a-21a) is unreported.

JURISDICTION

The court of appeals entered its judgment on February 5, 2002. The court of appeals filed an errata sheet correcting typographical errors in its opinion on February 19, 2002. The petition for a writ of certiorari was filed on May 3, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title II of the Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12131-12165 (1994 & Supp. V 1999), addresses discrimination by governmental entities and, in particular, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity," 42 U.S.C. 12132. A "public entity" is expressly defined to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(A) and (B).

The Rehabilitation Act of 1973, 29 U.S.C. 794, prohibits discrimination against persons with disabilities by programs or activities receiving federal financial assistance. Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * * ." 29 U.S.C. 794(a). A "program or activity" is expressly defined to include "all of the operations" of "a department, agency, special purpose district, or other instrumentality of a State or of a local government." 29 U.S.C. 794(b).

The Fair Housing Act, 42 U.S.C. 3601 *et seq.*, makes it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." 42 U.S.C. 3604(f)(1).

All three statutes define a covered disability as a physical or mental impairment that substantially limits one or more major life activities. All three laws also protect against discrimination on the basis of having such a disability, having a record of such a disability, or being regarded as having such a disability. See 42 U.S.C. 3602(h), 12102(2); 29 U.S.C. 705(20).

2. The Regional Economic Community Action Program, Inc. (RECAP) is a non-profit organization that provides education, housing, social services, and other programs to low-income individuals in Orange County, New York. Pet. App. 25a. In 1994, RECAP sought two special-use permits from the City of Middletown's Planning Board to establish new facilities on two contiguous parcels of land. With one permit, RECAP sought to construct and operate on a two and one-half acre lot, known as the "Rowley Property," a Head Start facility, along with infant day care services, and pediatric medical and dental services. *Id.* at 24a-25a. With the other permit, RECAP sought to operate a half-way house for 24 men recovering from alcoholism on a one-half acre lot, known as the "Formisano Property," and to operate a recovery facility for 20 alcoholic mothers and their children in a facility that would overlap both the Formisano and Rowley properties. *Id.* at 25a. The Rowley property is zoned for heavy industrial use, and the Formisano property is zoned for light industrial use. At that time, the City of Middletown's zoning ordinance permitted residential and commercial uses in an industrial zone, but required a special permit for multi-family residences. *Id.* at 25a-26a. Both properties abut the former Ontario & Western railroad line, a line on which rail traffic in 1994 was both infrequent and slow. *Id.* at 3a-4a; Pet. 10.

RECAP submitted its applications for the two projects simultaneously. The Planning Board unanimously authorized the Head Start and infant day care facility on the Rowley Property, without objections based on the industrial character of the area or the proximity of the facility to the railroad tracks. Pet. App. 26a, 41a-42a.

Unlike the debates over the Head Start program, deliberations over the halfway-house project were "contentious." Pet. App. 26a. At the first meeting, the Mayor objected that the City of Middletown should not be "the hub of human services programs" and that RECAP should "Do [the project] in Goshen. Do it in Warwick. Do it in Montgomery. Find a building there. Do it in some other community * * *." *Id.* at 39a. At subsequent meetings, the Planning Board's counsel expressed concern that "these people" might have criminal histories, and that if the Formisano property "is occupied by a certain type of social service or support service program, perhaps occupying the building next door will be deterred." *Id.* at 40a. The City's Director of Economic and Community Development echoed that view: "[I]f the building is occupied by a certain type of social service or support service program, [then] perhaps occupying the building next door will be deterred." RECAP Br. in Opp. 9 (quoting Nov. Hrg. Tr. 82-83). The Mayor shared those sentiments:

> I believe the significant factor for consideration here is the cumulative impact of the Governmentally, not for profit, and privately owned residential facilities for the disabled, mentally retarded, those who suffer from mental illness, drug and alcohol substance abuse problems. * * * I submit to you that the cumulative impact is negative both from a tax ex-

> empt perspective * * * and quality of life perspective.

Id. at 8-9 (quoting Oct. Hrg. Tr. 41-42). Not until the third meeting of the Board were concerns voiced about the light industrial zoning of the area or the proximity of the railroad tracks. *Id.* at 7.

The Board denied, by a 4-2 vote, a special-use permit for the construction and operation of the halfway-houses. Pet. App. 26a.

3. RECAP filed suit against the City, the Planning Board, and the Mayor, alleging violations of the Disabilities Act, the Rehabilitation Act, and the Fair Housing Act. The complaint alleged that the defendants acted with a discriminatory motive to prevent persons with disabilities—those suffering from alcoholism—from using suitable housing in the City of Middletown. The complaint also alleged an intentional failure to make reasonable accommodations in the zoning rules needed to afford persons with disabilities an equal housing opportunity. Finally, RECAP alleged that the City and the Mayor unlawfully retaliated against RECAP by withdrawing funding commitments for other RECAP projects. The United States intervened and filed a complaint against the City charging violations of the Disabilities Act, Rehabilitation Act, and Fair Housing Act in the denial of the special-use permit. Pet. App. 28a-29a.

The district court granted summary judgment for the petitioners and dismissed the action. Pet. App. 1a-21a. The district court assumed, for purposes of its decision, that the residents of the care facilities were disabled and that RECAP and the United States had stated a prima facie case of intentional discrimination under the

Disabilities Act and Fair Housing Act.[1] The court also found, however, that petitioners had articulated a legitimate, non-discriminatory reason for their actions. *Id.* at 12a-14a & n.14. Because the court concluded that RECAP and the United States had failed to come forward with any evidence from which a reasonable juror could find that petitioners' articulated justifications for the permit denial were pretextual, the court entered summary judgment for the petitioners.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 22a-48a. The court of appeals first held that RECAP's prospective clients—recovering alcoholics who are unable to remain sober while living independently—are persons with disabilities within the meaning of the Disabilities Act, the Rehabilitation Act, and the Fair Housing Act, because their alcoholism is a physical or mental impairment that substantially limits their ability to live independently and to care for themselves. *Id.* at 32a-36a. The court further held that RECAP's clients would also qualify for protection because "they have a record of having an impairment" that substantially limits major life activities. *Id.* at 36a.

With respect to RECAP's and the United States' disparate treatment claims, the court of appeals ruled that "a reasonable juror could conclude that the defendants' proffered reason for denying RECAP a special-use permit was a pretext for unlawful discrimination." Pet. App. 38a. In particular, the court noted that discriminatory intent could be inferred from the numerous

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[1] The court held, however, that RECAP and the United States had not stated a prima facie case under the Rehabilitation Act because they had failed to come forward with evidence that could establish that disability was the "sole" basis for the alleged discrimination, as required by 29 U.S.C. 794(a).

statements made by city officials and Planning Board members during the hearings suggesting that it was the status and condition of RECAP's clients, rather than concerns about industrial use or rail traffic, that animated the permit denial. *Id.* at 39a-40a.

The court further held that discriminatory intent could be inferred from the disparate treatment of the Head Start and halfway-house applications. Although those applications "were made at the same time, by the same entity, for adjoining properties," only the halfway-house application generated discussion about industrial use and railway traffic. Pet. App. 41a. A jury could find, the court of appeals reasoned, that the Head Start program was no more consistent with industrial use than the halfway houses. *Id.* at 42a ("We find no support for the conclusion that the Head Start program would facilitate industrial development."). With respect to the "rare[]" train traffic on the rail line, moreover, "[a] reasonable juror might wonder why the Planning Board worried more about the impact of the railroad on recovering alcoholics than on the infants and children whom it knew would be receiving education, medical attention, and other social services at the adjoining Rowley property." *Ibid.* Finally, the court noted that a map documenting the non-industrial character of surrounding properties might "cast doubt in jurors' minds upon the defendants' assertion that they sought to 'preserve' it as an industrial area." *Id.* at 43a.

The court of appeals similarly reversed the grant of summary judgment on RECAP's retaliation claim, based on record evidence from which a juror could infer that the Mayor and the City retaliated against RECAP for pursuing its present action. Pet. App. 46a-48a. The court affirmed the district court's dismissal of the dis-

parate impact and reasonable accommodation claims because no facially neutral policy or practice underlay the permit denials. *Id.* at 44a-46a.

ARGUMENT

1. Petitioners ask this Court (Pet. 3-10) to review the court of appeals' determination that RECAP's prospective clients are disabled, within the meaning of the Disabilities Act, the Rehabilitation Act, and the Fair Housing Act. That question does not merit this Court's review for four reasons.

First, the court of appeals' decision is consistent with the decisions of this Court. Petitioners do not dispute that alcoholism is an "impairment" under all three statutes. Regulations expressly identify alcoholism as an "impairment." See 28 C.F.R. 41.31(b)(1) (Rehabilitation Act) (cited in *Bragdon* v. *Abbott*, 524 U.S. 624, 631-633 (1998) (applying Rehabilitation Act regulations to the meaning of "disability" under the Disabilities Act)); 28 C.F.R. 35.104 (Disabilities Act); 24 C.F.R. 100.201 (Fair Housing Act).

The court of appeals correctly did not adopt a per se rule that the impairment of alcoholism necessarily constitutes a protected disability under those statutes. Instead, applying this Court's recent decision in *Toyota Motor Manufacturing, Kentucky, Inc.* v. *Williams*, 122 S. Ct. 681 (2002), the court undertook a particularized inquiry into whether the impairment of alcoholism "'prevents or severely restricts the individual from doing activities that are of *central importance to most people's daily lives.*'" Pet. App. 33a-34a (quoting *Williams*, 122 S. Ct. at 691). The court concluded that "the inability to live independently without suffering a relapse—a baseline prerequisite for admittance to the RECAP facility—limits the major life activity of caring

for one's self, an activity that is 'necessarily [an] important part[] of most people's lives.'" Pet. App. 35a (quoting *Williams*, 122 S. Ct. at 693). That conclusion is wholly consistent with this Court's decisions.

For the same reason, petitioners are wrong in arguing (Pet. 5-6) that the court failed to analyze the clients' disability in light of their treatment program, as required by *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999). The court of appeals properly considered whether RECAP's clients would face substantial limitations on major life activities *while in the treatment program*, and concluded that their "addictions substantially limit their ability to live independently and to live with their families," and that, "absent assistance, they cannot adequately care for themselves." Pet. App. 35a-36a. Indeed, state regulations restrict RECAP's halfway house clientele to individuals who are currently "suffering from alcohol dependence" and who are "unable to abstain without continued care in a structured supportive setting." N.Y. Comp. Codes R. & Regs. title 14, § 375.8(c)(1) and (5) (2002).

Second, petitioners do not contend that the court of appeals' decision conflicts with the rulings of other circuits. Nor could they. See *Schneiker* v. *Fortis Ins. Co.*, 200 F.3d 1055, 1059-1060 (7th Cir. 2000) (whether alcoholism is a disability turns upon an individual showing that it substantially impairs a major life activity); *Wallin* v. *Minnesota Dep't of Corr.*, 153 F.3d 681, 686 n.4 (8th Cir. 1998) (alcoholism is not a disability unless it substantially interferes with a major life activity), cert. denied, 526 U.S. 1004 (1999); *Burch* v. *Coca-Cola Co.*, 119 F.3d 305, 315-317 (5th Cir. 1997) (whether alcoholism or status as a "recovering alcoholic[]" is a disability turns upon an individualized inquiry into whether the alcoholism substantially impairs a major

life activity), cert. denied, 522 U.S. 1084 (1998); cf. *MX Group, Inc.* v. *City of Covington*, No. 00-6305, 2002 WL 1284277, at **9-11 (6th Cir. June 12, 2002) (holding that recovering drug addicts are individuals with disabilities where they showed a substantial limitation on major life activity during recovery); *United States* v. *Southern Mgmt. Corp.*, 955 F.2d 914, 917-919 (4th Cir. 1992) (drug addiction is a disability only if it substantially limits a major life activity).[2]

Third, the crux of petitioners' argument is not that the court of appeals failed to apply the same legal test for identifying covered disabilities as this Court and other courts of appeals, but that the court's application of that established law to "this record" (Pet. 8), and to the particular alcoholism condition suffered by RECAP's "recovering" clients (Pet. 3), was incorrect. That narrow and record-bound question does not warrant further review.

Fourth, and in any event, the halfway houses' prospective residents have a record of an impairment that substantially limits a major life activity. Pet. App. 36a. Petitioners' arguments for certiorari largely ignore that

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[2] See also *Pugh* v. *City of Attica*, 259 F.3d 619, 626 (7th Cir. 2001) (holding that employee who was "'regarded as' an alcoholic" by his employer was an individual with a disability under the Disabilities Act); *Evans* v. *Federal Express Corp.*, 133 F.3d 137, 139 (1st Cir. 1998) ("case law under both federal statutes [the Disabilities Act and the Rehabilitation Act] treats alcoholism as a covered disability"); *Williams* v. *Widnall*, 79 F.3d 1003, 1005 (10th Cir. 1996) ("[a]lcoholism is a covered disability" under Section 501 of the Rehabilitation Act); *Rodgers* v. *Lehman*, 869 F.2d 253, 258 (4th Cir. 1989) ("Alcoholism is a handicapping condition within the meaning of the [Rehabilitation] Act.") (citing 43 Op. Atty. Gen. 75, 81-82 (1977), *available at* 1977 WL 17999, which provides that an alcoholic is covered only if his or her alcoholism substantially limits a major life activity).

independently dispositive aspect of the court of appeals' decision.

2. Petitioners also seek (Pet. 10-27) this Court's review of the court of appeals' reversal of summary judgment on RECAP's and the United States' disparate treatment claims. Petitioners, however, do not argue that the court of appeals applied the wrong summary judgment standard. In fact, the court's decision wholly comports with *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Nor do they argue that the court of appeals misapplied the governing legal standard. The court of appeals hewed to the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Instead, petitioners expend substantial effort arguing the merits of the case, interpreting the facts in the record (and some that are not even in the record, see Pet. 23) in the light most favorable to their position. See *id.* at 10-27. That gets the legal test exactly backwards. *Beck* v. *Prupis*, 529 U.S. 494, 497 n.3 (2000); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In any event, the fact-bound and record-specific question of whether the evidence in this particular case satisfies well-established summary judgment principles does not merit this Court's review.

That is particularly true because of this case's interlocutory posture. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); compare *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., on denial of certiorari, noting the interlocutory posture of the litigation), with *United States* v. *Virginia*, 518 U.S. 515, 526, 530 (1996) (review granted after final judgment). The court of appeals did not resolve or reject the merits of petitioners' version of events. All the court held was that a rea-

sonable juror could conclude otherwise. Pet. App. 43a-44a. Petitioners remain free to present their arguments about the facts to the jury on remand; there is no sound reason for this Court to preempt the jury's decision. Accord *Reeves*, *supra*.[3]

3. Finally, petitioners argue (Pet. 28-30) that the court of appeals erred in reversing the grant of summary judgment on RECAP's retaliation claim. Because the United States did not intervene or file suit to assert such a claim, we take no position on that question and, instead, refer the Court to pages 28-29 of RECAP's brief in opposition. We note, moreover, that the fact that review of petitioners' other claims is not warranted counsels against piecemeal review at this juncture of petitioners' contentions on this question as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] As the court of appeals found, there was ample evidence from which a juror could conclude that petitioners' proffered explanations were pretextual, ranging from the hostile statements made during the Planning Board meetings to the differential treatment of the Head Start and halfway house applications, not to mention the numerous other non-industrial developments authorized in the area. See Pet. App. 39a-44a.